

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:

MODESTO RODRIGUEZ

Respondent.

HUDALJ 95-5029-DB(LDP)

Decided: August 3, 1995

Javier Riojas, Esq.
For Respondent

Mary Thomas, Esq.
For the Government

Before: CONSTANCE T. O'BRYANT
Administrative Law Judge

INITIAL DECISION

Statement of Facts

1. By letter dated July 1, 1994, Mr. Modesto Rodriguez ("Respondent") was notified by Luz Solis Day, Director, Office of Public Housing ("OPH"), HUD, that effective with the date of the letter, OPH was invoking the Limited Denial of Participation ("LDP") against him. As a result, Respondent was denied participation in the Department's Housing Programs. The cited cause for issuing the LDP was said to be set out in 24 C.F.R. § 24.705(b), and based on Respondent's indictment for indecency with a child who resided at the Pearsall Housing Authority. The LDP was to be effective for a twelve (12) month period and would extend to the jurisdiction of the San Antonio HUD Office, which includes fifty-seven (57) South Texas Counties. The letter also notified Respondent that OPH was recommending debarment in the case.

2. On July 28, 1994, Respondent wrote to Luz Solis Day, questioning the applicability of § 24.705 to him. He argued that as a board member of the Pearsall Housing Authority, he was neither a participant, a contractor nor an affiliate as defined in § 24.105, and therefore §§ 24.705(b) and 24.711 did not apply to him. By letter dated August 15, 1994, Luz Solis Day advised Respondent that the LDP regulations did, indeed, cover commissioners of housing authorities¹ based on the definitions set forth in

24 C.F.R. § 24.105(n)(p), and § 24.100.

3. On September 22, 1994, Respondent was notified that the LDP letter dated July 1, 1994, was amended. It was amended to state as follows: "By the authority of 24 C.F.R. § 24.700, as modified by Federal Registers dated April 15, 1994, and April 19, 1994, copies of which are enclosed, this office is, as of the date of this letter, invoking the Limited Denial of Participation ("LDP") against you as a person, and as a principal of the Pearsall Housing Authority. These terms are defined in 24 C.F.R. § 24.205(n)(p), and a copy is enclosed. The Pearsall Housing Authority is classified as a participant by virtue of the definition set out in 24 C.F.R. § 24.105(m), since the relationship between the Pearsall Housing Authority and HUD involves a covered transaction, as this is set out in 24 C.F.R. § 24.110, a copy of which is enclosed."

4. Respondent participated in an informal conference regarding this matter on November 15, 1994. By letter dated December 13, 1994, Respondent was notified that OPH had affirmed the LDP pursuant to 24 C.F.R. § 24.705(a)(2)(7)(9) and (10) and that he could appeal the determination. On January 11, 1995, Respondent filed a Notice of Appeal.

5. By letter dated March 6, 1995, Director Luz Solis Day, informed Respondent that the LDP letter dated September 22, 1994, and the letter dated December 13, 1994, were further amended to show the following legal authority for issuing the LDP: 24 C.F.R. §§ 24.705(a)(8), 24.305(d), and 24.705(b). In all other respects, the letters were to remain unchanged.

6. Sections 24.312 and 24.313 of the Department's regulations (24 C.F.R. §§ 24.312 and 313) provide that where, as here, the action is based on an indictment or conviction, the hearing is limited to submission of documentary evidence and written briefs. Accordingly, the parties were provided a briefing schedule, and briefs were timely received.

7. The LDP in the instant case was based upon Respondent's indictment by the Grand Jury of Frio County, Texas. (G-2).² The indictment charged Respondent with violation of the *Texas Penal Code*, § 21.11, Indecency with a Child (G-3). The child was a resident of the Pearsall Housing Authority property.

8. Subsequent to the effective date of the LDP, Respondent waived indictment for violation of *Texas Penal Code* § 22.04, Injury to a Child (G-4), plead "nolo contendere"

to the charge (a felony of the 1st degree). (G-5). The charge of Indecency with a Child was dismissed.

9. Title 5, § 22.04(a) (1) of the *Texas Penal Code*, describes the crime of Injury to a Child:

(a) A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child . . . (1) serious bodily injury.

At subsection (c) a "child" is defined as a person 14 years of age or younger and at subsection (e) an offense under subsection (a)(1) or (2) is a felony of the first degree when the conduct is committed intentionally or knowingly.

10. Respondent was placed on five years probation requiring community service under the aegis of the Adult Supervision Office of Frio County, Texas. Terms of his probation require, *inter alia*, that Respondent not be around children under 18 years of age unless they are under the supervision of a person over 21 years of age. (G-6).

Respondent's Claim

In his objection, Respondent has raised the following issues: 1) Whether he is subject to the LDP regulations in his capacity as a member of the Board of Directors of the Pearsall Housing Authority? 2). Whether HUD acted arbitrarily, capriciously, and contrary to its own regulatory structure when imposing the LDP sanctions against him? and 3) Assuming *arguendo* that HUD complied with its regulatory obligations, did Respondent nonetheless meet his burden of coming forward with evidence in opposition to HUD's proof, which justifies deviating from the administrative action taken?

With regard to issue number 2, Respondent argues, *inter alia*, that HUD's notices, including the March 6, 1995, notice, did not explain how his indictment (or subsequent conviction³ for Injury to a Child) evidenced good cause for imposing the LDP sanction. He asserts that for an indictment to constitute "adequate evidence" for LDP sanction, it must evidence an item within the "laundry-list" of causes for an LDP sanction set forth at 24 C.F.R. § 24.705(a). By this argument, Respondent asserts that there must be a nexus between the crime for which he was indicted (or convicted) and his "present responsibility" for doing business with HUD.

HUD counters that Respondent has misstated the law. It asserts that under

applicable HUD regulations, an indictment, *per se*, of a contractor or participant, constitutes "adequate evidence"⁴ of suspected criminal conduct of said person, and is sufficient under HUD's regulations to impose a limited denial of participation, without addressing the underlying facts. HUD argues that Respondent's claim that the indictment must evidence an item within the "laundry-list" of 24 C.F.R. § 24.705(a), is without merit.

I find that HUD has not presented "adequate evidence" for imposing the LDP sanction against Respondent because the conviction of Respondent for the offense of injury to a child does not evidence an act or omission constituting good cause for invoking the LDP. Because of my disposition on issue number 2, the remaining issues need not be addressed.

Discussion

Underlying the Government's authority not to do business with a person is the requirement that agencies only do business with "responsible" persons and entities. 24 C.F.R. § 24.115. The term "responsible" as used in the context of suspension and debarment is a term of art which includes not only the ability to perform a contract satisfactorily, but also business integrity, business honesty, and the general ability to conduct business lawfully. *See* 24 C.F.R. § 24.305. *See also Gonzalez v. Freeman*, 334 F.2d 570, 573 & n.4, 576-77 (D.C. Cir. 1964). The test for whether a suspension is

warranted is "present responsibility." It is well established that a lack of "present responsibility" may be inferred from past acts. *Schlesinger v. Gates*, 249 F. 2d 111 (D.C.Cir. 1957); *Stanko Packing Co. v. Bergland*, 489 F. Supp. 947, 949 (D.C.D.C. 1980).

It is also well established that an indictment constitutes "adequate evidence" of suspected criminal conduct and may be the basis for an LDP against a "participant" in a "covered transaction" if the LDP is shown to be in the public interest. 24 C.F.R. § 24.705(b). *See also* 24 C.F.R. § 24.313(b)(3). The sufficiency of the indictment, *per se*, as the basis for an LDP has long been upheld. *See Alexander & Alexander, Ltd.*, HUDBCA No. 82-727-D46 (January 25, 1983); *John P. Moscony*, HUDBCA No. 89-4444-D17 (May 24, 1989); and *James E. McFrederick, et al*, HUDBCA No. 89-4475-D27 (September 28, 1989). The formalities attendant to the issuance of an indictment (the finding of probable cause by a grand jury) carry sufficient indicia of reliability to allow the Government to take action to protect itself against future dealings with someone so accused. *James A. Merritt & Sons v. Marsh*, 791 F. 2d 328, 330-31 (4th Cir. 1986). However, not all indictable crimes constitute cause for an LDP. In other words, an indictment constitutes adequate evidence of cause to issue an LDP *only* if the crime

charged in the indictment is one of the crimes listed in the regulations.

The regulations at 24 C.F.R. § 24.705(a) provide that a limited denial of participation shall be based upon adequate evidence of any of the following causes:

- (1) Approval of an applicant for insurance would constitute an unsatisfactory risk;
- (2) Irregularities in a participant's or contractor's past performance in a HUD program;
- (3) Failure of a participant or contractor to maintain the prerequisites of eligibility to participate in a HUD program;
- (4) Failure to honor contractual obligations or to proceed in accordance with contract specifications or HUD regulations;
- (5) Failure to satisfy, upon completion, the requirements of an assistance agreement or contract;
- (6) Deficiencies in ongoing construction projects;
- (7) Falsely certifying in connection with any HUD program, whether or not the certification was made directly to HUD;
- (8) Commission of an offense listed in § 24.305;
- (9) Violation of any law, regulation, or procedure relating to the application for financial assistance, insurance or guarantee, or to the performance of obligations incurred pursuant to a grant of financial assistance or pursuant to a conditional or final commitment to insure or guarantee.
- (10) Making or procuring to be made any false statement for the purpose of influencing in any way an action of the Department.
- (11) Imposition of a limited denial of participation by any other HUD regional or field office.
- (12) Debarment or suspension by another Federal agency for any cause substantially the same as provided in § 24.305.

As indicated above, Respondent was informed by the July 1, 1994, letter that HUD had "adequate evidence" that he had been indicted for indecency with a child, and that by authority of 24 C.F.R. § 24.705(b), HUD was issuing an LDP against him. However, the notice did not cite any of the 12 causes listed in § 24.705(a) above, or provide any other specific cause listed in the regulations as a basis for issuing the LDP. In addition, neither the August 15, 1994, nor the September 22, 1994, notice cited one of the 12 causes listed under § 24.705(a).

By letter dated December 13, 1994, HUD advised Respondent of its decision affirming the prior notices of LDP. For the first time, the notice cited specific causes for the LDP sanction. It cited 24 C.F.R. § 24.705(a) (2) (7) (9) and (10).

Section 24.705(a) provides at subsections (2) (7) (9) and (10) as follows:

(2) Irregularities in a participant's or contractor's past performance in a HUD program;

* * *

(7) Falsely certifying in connection with any HUD program, whether or not the certification was made directly to HUD;

* * *

(9) Violation of any law, regulation, or procedure relating to the application for financial assistance, insurance or guarantee, or to the performance of obligations incurred pursuant to a grant of financial assistance or pursuant to a conditional or final commitment to insure or guarantee. [and]

(10) Making or procuring to be made any false statement for the purpose of influencing in any way an action of the Department.

The notice did not state, nor is it apparent, how Respondent's indictment for the offense of Indecency with a Child evidences any of the causes for an LDP listed above. I find

that HUD has not presented adequate evidence to establish cause under subsections 24.705(a) (2) (7) (9) or (10).

On March 6, 1995, apparently after receiving and considering Respondent's specific objection on the basis of inadequacy of the notice,⁵ HUD sent out a fourth notice, amending the prior notices. This notice asserted a cause under §§ 24.705(a)(8) and 24.305(d).

Section 24.705(a)(8) provides as follows:

(a) A limited denial of participation shall be based upon adequate evidence of any of the following causes:

* * *

(8) Commission of an offense listed in § 24.305.

Section 24.305(d) provides, in pertinent part, that debarment may be imposed in

accordance with the provisions of §§ 24.300 through 24.314 for:

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person. (1) These causes include but are not limited to:

(i) Failure to comply with title VIII of the Civil Rights Act of 1968 or Executive Order 11063, HUD's Affirmative Fair Housing Marketing Regulations or an Affirmative Fair Housing Plan;

(ii) Violation of title VI of the Civil Rights Act of 1964, section 109 of the Housing and Community Development Act of 1973, section 504 of the Rehabilitation Act of 1973, or the Age Discrimination Act of 1975;

(iii) Violation of any law, regulation or agreement relating to conflict of interest;

(iv) Violation of any nondiscrimination provisions included in any agreement or contract.

The causes enumerated above relate to violations of nondiscrimination or conflict of interest laws, all of which indicate the person's lack of willingness to be fair and honest in business dealings. It is not apparent how Respondent's conviction for the crime of Injury to a Child, as it is defined in the Texas statute, affects his ability to deal honestly and fairly in a business setting.

Although HUD acknowledges that the causes listed in § 24.305(d) relate to conflict of interest and nondiscriminatory provisions, it argues that the provisions do not limit to those causes, but includes *any* other cause that is determined to be of so serious or compelling a nature as to affect the present responsibility of a person. HUD argues that Respondent's conviction of the first degree felony offense of Injury to a Child affects his present responsibility by demonstrating a lack of personal integrity. It points to certain terms and conditions of Respondent's probation by the Texas court as showing the seriousness of the offense of which Respondent was convicted and states that the seriousness of his conduct constitutes adequate evidence of lack of present responsibility and is sufficient to support issuance of an LDP under § 24.305(d). HUD argues that as an agency of the Government, it is required to do business only with "responsible" persons, and that a felony conviction "is certainly a cause of so serious and compelling a nature that it affects a person's present responsibility."

HUD seems to contend that *each and every felony conviction*, regardless of the nature of the crime, demonstrates that the person convicted does not have the

responsibility -- the business integrity and business honesty -- to participate in any HUD program. I find no basis in the law for this position.

As indicated above, the general language in § 24.305(d): "any other causes of so serious or compelling a nature that it affects the present responsibility of a person," is followed by examples of specific violations which constitute cause. Although it is clear from the regulations that cause under this section is not limited to the expressly enumerated causes, that does not mean that the language is broad enough to encompass conduct totally unrelated to the conduct described therein. HUD's interpretation of § 24.305 violates general rules of statutory construction and is unpersuasive.

Ejusdem generis, which literally means "of the same kind or species," is a well established rule used in the interpretation of written instruments. Under this maxim, courts will adopt a restrictive meaning of listed items if acceptance of a more expansive meaning would make other items on the list unnecessary or redundant, or would otherwise make the item markedly dissimilar to other items on the list. Stated in another way, where there is an enumeration of specific things which is followed or preceded by general words (i.e., used in sequence), the rule restricts application of the general provision to items similar to the specific ones. In other words, the general provision will be controlled and limited by subsequent language more specific in scope. *Wedding v. Wingo*, 483 F. 2d 1131, 1135. *See also U.S. v. Baranski*, 484 F. 2d 556, 567 (where general words in a statute or other written instrument are followed by designation of particular things or subjects included or excluded, inclusion or exclusion will be presumed to be restricted to such similar things or subjects); *Bumpus v. U.S.*, 325 F. 2d 264, 267; *Carriere v. Cominco Alaska, Inc.*, 823 F. Supp 680, 689; *U. S. v. Mandel*, 415 F. Supp. 997, 1021; *First National Bank and Trust Co. of Tulsa v. Lincoln Power Corp.*, 118 F. Supp 340, 345; *Abeles v. Adams Engineering Co.*, 165 A. 2d 555, 560; *Beck v. Wade* 110 S.E. 2d 43, 46; *State v. Engler*, 259 N. W. 2d 97, 100; *City of Knoxville v. Brown*, 260 S.W. 2d 264, 268; and *State v. Reader's Digest Ass'n Inc.*, 501 P. 2d 290, 303.

Applying *ejusdem generis* to the facts of this case precludes the construction urged by HUD. The "any other cause" provision in § 24.305(d) limits unlisted causes to those similar in kind to the specific ones listed, i.e., to violations of conflict of interest or nondiscrimination laws. Respondent's conviction for the crime of Injury to a Child, as it is defined in the Texas statute, is not of the same or similar kind as the violations enumerated under § 24.305(d). Accordingly, HUD's reliance upon §§ 24.705(a)(8) and 24.305(d) is misplaced and does not justify the LDP action in this case.

Nor does Respondent's conviction constitute cause under any other provision in § 24.305. Neither the indictment nor the conviction is for the commission of one of the

criminal offenses listed in §§ 24.705(a)(8) and 24.305(a). The criminal offenses listed as cause for debarment in the regulations clearly relate to business honesty or business integrity such as fraud, price fixing between competitors, embezzlement, forgery, falsification of records, receiving stolen property, and making false claims. The conduct for which Respondent was convicted does not fall into this category.

The causes listed at § 24.305(b) also clearly relate to business responsibility. That section provides cause for debarment where there has been a serious violation of the terms of a public agreement or transaction, such as a wilful failure to perform in accord with the agreement; a history of failure to perform or unsatisfactory performance of the public agreement; or a wilful violation of a statutory or regulatory provision applicable to the public agreement. Again, Respondent's conduct is not covered by these causes.

Nor is Respondent's conduct captured under § 24.305(c). That section provides causes relating to prior demonstration of dishonesty or lack of responsibility in dealing with the Federal Government -- to debarments (nonprocurement or procurement) by any Federal agency; or knowingly doing business with a debarred, suspended, ineligible, or voluntarily excluded person in connection with a covered transaction and failure to pay

debts to Federal Government. Clearly, Respondent's indictment or conviction is not evidence of any cause under this provision.

Sections 24.305(e) and 24.305(f) provide that in addition to the causes set forth in § 24.305(a) - (d), HUD may debar a person from participating in any programs or activities of the Department for material violation of a statutory or regulatory provision or program requirement applicable to a public agreement or transaction. Respondent's conduct does not fall within these proscriptions either.

Finally, HUD finds important the fact that Respondent was found guilty of injury to a child who was a public housing resident in a project subsidized with HUD funds. HUD argues this circumstance cries out for the Government to take the LDP action taken. After chronicling the conditions of Respondent's probation, including the fact that he is prohibited from being around children under 18 years of age, unless supervised by an adult, HUD asserts that:

As a Commissioner of the Pearsall Public Housing Authority, Respondent will come in frequent contact with young children, since the Pearsall Housing Authority owns 80 units, many of which house young children. Children are on the Housing Authority play areas and in the Housing Authority Offices. Respondent, in his role as a Commissioner, has unlimited access to

Housing Authority property.⁶ By allowing Respondent to remain as a Commissioner were the sanction not to be upheld, HUD could find itself in the position of providing the means for Respondent to violate his Probation Order.

Although Respondent's conviction indeed evidences a lack of moral integrity or moral turpitude, it does not follow that HUD may be perceived as having condoned Respondent's conduct or facilitated future misconduct if an LDP is not imposed. HUD is not a moral arbiter or guardian of the conduct of persons associated with public housing authorities. Moreover, as HUD has noted, the terms of Respondent's probation prohibit him from being around children unless supervised by a responsible adult. Thus, the court has already taken steps to protect children residing in Pearsall Public Housing from Respondent. In any event, there is nothing in the regulations that either expressly, or implicitly, makes conviction for crimes of moral turpitude cause for an LDP suspension or debarment. Although HUD's concern for the safety of the children of the Pearsall

Public Housing Authority is commendable, the law does not permit HUD to use an LDP to sanction conduct other than conduct specified in the regulations.

Conclusion

For the reasons discussed above, I find that HUD has not established cause under § 24.705(a) for the LDP in this case. I conclude that the Government has not shown a nexus between Respondent's conduct and his ability to act responsibly as a commissioner of the Pearsall Housing Authority. Accordingly, the LDP action is hereby ORDERED dismissed.

CONSTANCE T. O'BRYANT
Administrative Law Judge

CERTIFICATION OF SERVICE

I hereby certify that copies of this INITIAL DECISION issued by CONSTANCE T. O'BRYANT Administrative Law Judge, in HUDALJ 95-5029-DB(LDP), were sent to the following parties on this 3rd day of August, 1995, in the manner indicated:

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